

UNITED STATES COURT OF APPEALS June 30, 2008

FOR THE TENTH CIRCUIT Elisabeth A. Shumaker  
Clerk of Court

In re:

JEFFREY DAN WILLIAMS,

Movant.

No. 08-5079

(D.C. No. 4:97-CR-171-HDC-1)

(N.D. Okla.)

ORDER

Before **KELLY, BRISCOE**, and **LUCERO**, Circuit Judges.

Jeffrey Dan Williams, a federal prisoner proceeding pro se, filed in district court a “Petition for Writ of Audita Querela Pursuant to the All Writs Act.” The court recharacterized the pleading as a motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255; deemed it a second or successive § 2255 motion; and then transferred it to this court pursuant to *Coleman v. United States*, 106 F.3d 339, 341 (10th Cir. 1997) (per curiam). Mr. Williams has filed “Objections to the Recharacterization of His Common Law Writ of Audita Querela.” Construing this filing as a motion to remand to the district court, we deny it.

Mr. Williams pled guilty to (1) one count of conspiracy to possess with intent to distribute methamphetamine, conspiracy to manufacture methamphetamine, and conspiracy to maintain various locations for

manufacturing methamphetamine; (2) two counts of possession with intent to distribute methamphetamine; and (3) one count of knowingly carrying a firearm during drug trafficking. He was sentenced to 360 months of concurrent imprisonment for the first three counts and five years of consecutive imprisonment for the fourth count. He appealed, alleging that the district court should have allowed him to withdraw his guilty plea, the firearm count did not state an offense with sufficient specificity, and the district court misapplied the Sentencing Guidelines with respect to the quantity and quality of the methamphetamine. We affirmed, rejecting each of these arguments. *United States v. Williams*, No. 98-5263, 1999 WL 1079602 (10th Cir. Nov. 30, 1999), *cert. denied*, 529 U.S. 1117 (2000).

In his first § 2255 motion, Mr. Williams raised thirteen ineffective assistance of counsel claims, including several asserting counsel's failure to object to sentence enhancements that allegedly violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The district court denied relief, and we denied Mr. Williams a certificate of appealability and dismissed his appeal. *United States v. Williams*, 44 F. App'x 443 (10th Cir. 2002), *cert. denied*, 537 U.S. 1138 (2003).

The following year, Mr. Williams filed a Fed. R. Civ. P. 60(b)(6) motion to reopen the final judgment, asserting the federal courts lacked jurisdiction and trial and appellate counsel were ineffective for failing to present this argument. The

district court denied the motion, holding that it had subject matter jurisdiction. On appeal, we vacated the district court's order because that court lacked jurisdiction over the Rule 60(b) motion, concluded the motion was actually an unauthorized second or successive § 2255 motion, construed Mr. Williams' notice of appeal and appellate briefs as a request for authorization to file a second or successive § 2255 motion, and denied authorization. *United States v. Williams*, No. 04-5013 (10th Cir. July 20, 2004) (unpublished).

Subsequently, Mr. Williams filed another Rule 60(b) motion in district court, this time arguing that his sentence should be reduced from thirty-five to fifteen years because a jury did not make the factual findings that enhanced his sentence by twenty years, contrary to the authority of *Apprendi*; *Blakely v. Washington*, 542 U.S. 296 (2004); and *United States v. Booker*, 543 U.S. 220 (2005). The district court decided this motion raised claims similar to those Mr. Williams had raised previously in post-conviction proceedings and the motion was an unauthorized second or successive § 2255 motion. The court therefore dismissed for lack of jurisdiction. On appeal, we vacated the district court's order for lack of subject matter jurisdiction, construed Mr. Williams' notice of appeal and appellate briefs as an implied motion for authorization to file a second or successive § 2255 motion, and denied authorization. *United States v. Williams*, 167 F. App'x 25 (10th Cir.), *cert. denied*, 547 U.S. 1155 (2006).

Most recently, Mr. Williams filed in district court the “Petition for a Writ of Audita Querela pursuant to the All Writs Act,” again arguing that his sentence is unconstitutional under *Booker* because judge-found facts enhanced his sentence by twenty years. He further argues that because *Booker* does not apply retroactively on collateral review, the writ of audita querela is his only means to challenge his unconstitutional sentence. After recharacterizing the pleading as a second or successive § 2255 motion, the district court transferred it to this court. Making the same arguments he made in the district court, Mr. Williams now effectively seeks remand of his petition to that court.

It is settled that a post-judgment motion must be treated as a second or successive § 2255 motion and certified by an appellate panel if it asserts or reasserts a substantive claim to set aside the movant’s conviction or sentence. *See Gonzalez v. Crosby*, 545 U.S. 524, 530-32 (2005) (deciding the extent to which Rule 60(b) motion filed in 28 U.S.C. § 2254 proceeding should be considered second or successive habeas petition); *United States v. Nelson*, 465 F.3d 1145, 1147-49 (10th Cir. 2006) (deciding that if post-conviction motion does not attack defect in integrity of federal post-conviction proceedings, but rather seeks relief from conviction or sentence, it should be treated as successive motion to vacate). Mr. Williams’ petition for a writ of audita querela asserts substantive claims to set aside his sentence. Thus, as the district court concluded, it was essentially a successive § 2255 motion. *See United States v. Torres*,

282 F.3d 1241, 1245, 1246 (10th Cir. 2002) (concluding that “a writ of audita querela is not available to a petitioner when other remedies exist, such as a motion to vacate sentence under 28 U.S.C. § 2255” and that movant cannot escape bar against successive § 2255 motion “by simply styling a petition under a different name”) (quotation omitted).

Mr. Williams relies on *Kessack v. United States*, No. C05-1828Z, 2008 WL 189679 (W.D. Wash. Jan. 18, 2008), to support his argument that a petition for a writ of audita querela is proper. The district court in *Kessack* held that the writ was available based on the extraordinary circumstances presented in that case: (1) Mr. Kessack’s sentence was vastly longer than that of his co-defendants and he was therefore uniquely impacted by the then-mandatory Guidelines and (2) *Booker* announced a new rule of constitutional law that was not foreseeable when Mr. Kessack was sentenced, appealed, or filed his habeas petition. *Id.* at \*5-\*6. Thus, the court declined to construe the petition for a writ of audita querela as a second or successive § 2255 motion. *Id.*

We, however, decline to follow the holding in *Kessack*. First, we are not bound by an unpublished district court decision. Moreover, Mr. Williams has failed to show any truly unique circumstances exempting him from complying with the requirements for filing a second or successive § 2255 motion. “[T]he mere fact” that he may be “precluded from filing a second § 2255 [motion] does not establish that the remedy in § 2255 is inadequate.” *Carvalho v. Pugh*,

177 F.3d 1177, 1179 (10th Cir. 1999). Thus, because § 2255 addresses the issue in this case, § 2255, and not the All Writs Act, is controlling. *See Carlisle v. United States*, 517 U.S. 416, 429 (1996).

Accordingly, we DENY Mr. Williams’ “Objections to the Recharacterization of His Common Law Writ of Audita Querela,” which we construe as a motion to remand.<sup>1</sup> This matter is closed.

Entered for the Court

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", followed by a horizontal line.

ELISABETH A. SHUMAKER, Clerk

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<sup>1</sup> Because Mr. Williams has not sought authorization to file a second or successive § 2255 motion, we do not consider authorization. Even if we were to consider authorization, it would be denied, because *Booker* does not apply retroactively to final criminal judgments. *See United States v. Bellamy*, 411 F.3d 1182, 1184 (10th Cir. 2005).